Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

DEANNA TURNER,

Petitioner,

vs.

THE SECRETARY OF THE
UNITED STATES DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Donald Driscoll
Community Justice Project
1705 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15219
412-434-6012

Counsel for Petitioner

QUESTIONS PRESENTED

A. Does the Administrative Procedure Act provide judicial review of an agency breach of a mandatory enforcement duty under the Fair Housing Act in the absence of clear and convincing evidence of legislative intent that an alternative private remedy against an underlying discriminator is adequate to remedy the legal wrong caused by the agency action?

B. Was it Congress' intent in enacting section 10(c) of the Administrative Procedure Act to require, in addition to a consideration of alternative forums available to address legal wrongs "because of agency action," a consideration of alternative forums to address legal wrongs caused by non-agency actors without regard to agency action?

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JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered on May 31, 2006. Rehearing was denied by order entered on August 1, 2006. Jurisdiction is conferred on this Court to review on a writ of certiorari the judgment and order in question by 28 USC § 1254(1).

THE STATUTES AND REGULATIONS INVOLVED

The Administrative Procedure Act (APA), 5 USC § 701 et seq. and specifically 5 USC §§ 701, 702, 704 and 706.

The Fair Housing Act (FHA), 42 USC 3601 et seq. and specifically 42 USC §§ 3610, 3612 and 3613.

Regulations of the U.S. Department of Housing and Urban Development, specifically 24 CFR § 103-400.

The specific statutory and regulatory provisions are set out verbatim in the Appendix.

STATEMENT OF THE CASE

The Petitioner Deanna Turner became totally and permanently disabled in August 2000 and was forced to leave her employment. She has suffered from a number of disabling conditions including degenerative disc disease, fibromyalgia, diabetes, heart disease and anxiety/depression (Complaint, ¶ 11). With the loss of her employment, she lost the ability to pay her rent on a timely basis and sought assistance to do so. (Complaint, ¶'s 13, 18, 22). She finally

succeeded in obtaining a rental assistance voucher through the Section 8 program pursuant to the U.S. Housing Act, 42 USC § 1437f, and in early October 2001 offered this to the rental management company (hereafter "Crawford Square"). She was also able to obtain a commitment from the Urban League of Pittsburgh to assist her with her outstanding rent arrearage which then consisted of rent for October 2001 and at most one additional month. (Complaint ¶'s 22-26).

Nevertheless, this assistance was refused without explanation other than the petitioner's late rental payment which had only occurred after her disability and due to her disability, and which would be cured (Complaint ¶'s 23, 26, 29). Instead, Crawford Square pursued the Petitioner's eviction (Complaint ¶'s 23, 24).

The Petitioner thereupon filed an administrative complaint with the U.S. Department of Housing and Urban Development (HUD) under the Fair Housing Act, specifically 42 USC § 3610. She claimed that Crawford Square discriminated against her in the rental and provision of services in connection with the rental of her home due to her handicap and that Crawford Square failed to make reasonable modifications to its rules, services, practices and policies as necessary to allow her the continued use and enjoyment of her home.

She filed her complaint administratively because she did not have the resources to investigate Crawford Square's conduct nor the assistance of counsel to proceed directly in court. She needed and sought to obtain the benefit of HUD's investigation and ongoing prosecutorial assistance, if it determined "based solely on the facts concerning the alleged discriminatory housing practices" that there was reasonable cause to believe that such a practice or practices had occurred. See 24 CFR § 103.400(a)(1) and (2) and 42 USC § 3610(g)(1) and (2). At the time Crawford Square's eviction action went to trial in state court, the HUD

investigation was underway. The Petitioner did not raise her FHA claims in state court because of her election to proceed in the federal administrative forum, as provided in § 3610. Had she raised her FHA claims in the state action brought by her landlord and sought relief with respect to the alleged discriminatory housing practices, HUD would have been required to dismiss her administrative complaint at the commencement of the state trial. 42 USC § 3610(g)(4).

HUD subsequently completed its investigation finding, among other things, that Crawford Square had treated the Petitioner differently than other non-disabled tenants (Court of Appeals Supplemental Appendix at p. 15 (hereafter S.A. at 15), Complaint ¶'s 33, 34). It, nevertheless, dismissed her administrative action. Though it nominally titled its decision a "Determination of No Reasonable Cause," it stated that it based this dismissal on the "legal doctrine of res judicata" and that it "did not make a determination with regard to the underlying allegations of her complaint" (S.A. at 1, 7 and 15 and Complaint ¶ 32).

In a subsequent private action against Crawford Square, Petitioner unsuccessfully argued that res judicata should not be applied due to a "failure" to bring her FHA claims in state court.[1] Among other arguments she pointed out that the state compulsory claim or counterclaim rule expressly excepts from waiver claims not "heretofore asserted in assumpsit or trespass" (Pa.R.Civ.P. 1020(d)). Nevertheless, as relevant to the present case, unless the FHA claim was actually raised and heard on the merits in the state proceeding, the state proceeding should have no bearing on HUD's express duty to issue a determination of reasonable cause based solely on the facts and express duty to issue a charge accordingly. 42 USC § 3610(g)(1)(2) and (4). Furthermore, HUD was not a party to the state proceeding and has an interest different from the Petitioner's in the administrative proceeding. See *EEOC v.*

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[1] *Turner v. Crawford Square*, 449 F.3d 542 (3d Cir. 2006)

Waffle House, 534 U[illegible]279 (2002) where the Court applying similar enforcement [illegible] visions held that the EEOC has an interest in ADA and Title VII enforcement, independent of its complainant, who was precluded from proceeding on his own by his entry into a binding arbitration agreement. See also *Secretary on behalf of Exelberth v. Riverbay Corp.*, HUD ALJ 02-93-0320-1 (September 8, 1994) at pp. 9-10 and *Secretary on behalf of Jorgensen v. Kogut and Law Corporation*, HUD ALJ 09-93-1245-1 (April 17, 1995) at pp. 10-11, decisions of federal administrative law judges under 5 USC § 3105 included in the Addendum to the Petitioner's Reply Brief in the Court of Appeals (holding that HUD's interest in vindicating the public interest is different from the complainant's and rejecting res judicata due to asserted failure to raise the FHA claims in state eviction proceedings).

Upon HUD's dismissal of her administrative complaint, Petitioner commenced the present action in the District Court seeking review under the APA of HUD's failure to carry out its express duty to determine "based solely on the facts concerning the alleged discriminatory housing practices" whether there is reasonable cause to believe that such a practice has occurred (S.A. at 17, Complaint ¶ 42). The District Court denied review based on 5 USC § 704, determining that the Petitioner had an adequate remedy in court, an action directly against her landlord for the alleged discrimination. Following appeal, the court below affirmed.

Jurisdiction to hear this matter in the District Court was available pursuant to 28 USC § 1331 (federal question) and 1361 (in the nature of mandamus). Jurisdiction in the Court of Appeals was available pursuant to 28 USC § 1291.

ARGUMENT

A. The United States Court of Appeals for the Third Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Despite this Court's decisions in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and *Bowen v. Massachusetts*, 487 U.S. 879 (1988) and related decisions in *Heckler v. Chaney*, 470 U.S. 821 (1985) and *Dunlop v. Bachowski*, 421 U.S. 560 (1975), the court below has determined that the APA does not provide for judicial review of an agency failure to carry out a specific, mandatory statutory duty related to the enforcement of laws designed to protect the public from unlawful discrimination, and has made this determination without regard to and in spite of a clear expression of Congressional intent.

The Fair Housing Act and its legislative history make clear that victims of discriminatory housing practices have a choice of administrative or private judicial remedies; that the former was added to overcome the inadequacy of the latter; that fair housing enforcement was not previously occurring because victims lacked the resources to adequately investigate and prosecute their individual claims; and that unless victims of discrimination actually raise their discrimination claims in a court and these claims are actually tried, the administrative assistance directed to be made available is not to be denied. It is inconsistent with the FHA's express terms and legislative history to allow landlords to preempt this election by commencing state eviction proceedings before an administrative investigation can be completed. Such proceedings do not relieve HUD of its mandatory duties to determine reasonable cause based solely on the facts and proceed with a charge, as appropriate, and do not relieve U.S. district courts of their duty to exercise their federal question jurisdiction should HUD fail to act in accordance with its mandatory duties.

The court below relied on an ever broadening line of

lower court decisions which, though originating before this Court's rulings in *Bowen* and *Heckler*, produced results consistent with the analysis of these decisions. However, the court below has now extended these lower court rulings beyond their holdings, and, most importantly, to a point inconsistent with Congressional intent regarding judicial review, as set out in the decisions of this Court.

This Court in *Abbott Laboratories*, after surveying its prior decisions, determined that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." 387 U.S. at 140 (citations omitted). The question to be asked is not whether an act of Congress authorized judicial review, but whether review was prohibited. Ibid.

The Court construed the enactment of the Administrative Procedure Act as reinforcing its earlier decisions, referencing both the express terms of this Act and its legislative history. Regarding the latter, the Court noted that the "legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions," quoted H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946) (" 'To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.' ") and additionally cited S. Rep. 752, 79th Cong., 1st Sess., 26 (1945). Id. 387 U.S. at 140 and n.2. Finally the Court noted that its decisions "had echoed that theme" quoting, among other authorities, *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) ("the administrative Procedure Act's 'generous review provisions' must be given a hospitable interpretation") and *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review"). Id. at 140-41.

The APA expressly provides that a "person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review" of the agency action. 5 USC § 702. This may not be denied unless the relevant statute precludes judicial review, 5 USC § 701(a)(1), agency action is committed to agency discretion by law, 5 USC § 701(a)(2), or there is another adequate remedy for the agency action in a court, 5 USC § 704. This Court further considered the presumption of reviewability determined in *Abbott* as it applied to § 701(a)(2) and agency enforcement discretion in *Heckler v. Chaney* and *Dunlop v. Bachowski* and as it applied to § 704 and another adequate remedy in *Bowen v. Massachusetts*.

In *Heckler v. Chaney* this Court recognized an exception to the general presumption of reviewability in the instance of discretionary decisions not to take enforcement action. The Court cited cases which had determined that such non-enforcement decisions were generally committed to an agency's absolute discretion. Id. 470 U.S. at 831, *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869). After discussing several reasons for the general unsuitability of review in these instances, the Court concluded that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." Id. at 832.

The Court, nevertheless, emphasized that a decision not to take enforcement action "is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." Id. at 832-833 (footnote omitted). The Court specifically noted that *Dunlop v. Bachowski* "presents an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability." Id. at 833.

In *Dunlop*, the Court considered review of the Secretary of Labor's compliance with enforcement provisions of the Labor-Management Reporting and Disclosure Act (LMRDA). As summarized by the Court in *Heckler*, "Section 482 [of the LMRDA] provided that, upon filing of a complaint by a union member, '[the] Secretary *shall* investigate such complaint and, if he finds probable cause to believe that a violation...has occurred...he *shall*... bring a civil action...'" Id. at 833 (emphasis added). In contrast to the LMRDA's mandatory duties, Section 332 of the Food, Drug, and Cosmetic Act, at issue in *Heckler*, "gives no indication of when an injunction should be sought, and § 334, providing for seizures, is framed in the permissive." Id. at 835.

In *Bowen v. Massachusetts* this Court again considered the APA's presumption of reviewability and applied this presumption to the "no other adequate remedy" for "the final agency action" provision in § 704. Reviewing legislative history and the contemporaneous remarks of the Attorney General, the Court determined that "when Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." Id. 487 U.S. at 901. The Court cited examples of statutes which contained "specific procedures to be followed in reviewing a particular agency's action," such as the review of agency orders directly in the regional courts or specially constituted three-judge district courts. Ibid. Citing *Abbott Laboratories*, the Court remarked that "[t]he [§ 704] exception that was intended to avoid such duplication should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." The Court additionally cited *Shaughnessy v. Pedreiro* in stating that "[a] restrictive interpretation of § 704 would unquestionably, in the words of Justice Black, 'run counter to § 10 [§ 704] and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to

judicial review of agency action under subsequently enacted statutes.'" Id. at 903-904. See also *Darby v. Cisneros*, 509 U.S. 137 (1993) where, as in *Bowen*, the Court was guided by Congressional intent in refusing to restrict review of agency action by expanding § 704's exhaustion requirement beyond the express statutory allowance for this. Id. at 146-147 and 153-154.

The court below, nevertheless, in ruling in the present case relied on a line of lower court decisions originating before *Bowen's* application of the presumption of reviewability to the consideration of § 704 and before *Heckler's* preservation of review of decisions not to enforce when non-discretionary statutory duties are imposed. Furthermore, it expanded on this line of authority by rejecting APA review in all situations where a private remedy for the underlying discrimination simply exists. Contrary to *Bowen*, and other decisions of this Court, the court below provided no analysis of Congressional intent regarding the statutory enforcement scheme at issue, and cited to no statutory alternative to the APA's review of the agency action raised herein, which itself constituted a legal wrong.[2] Even assuming that a private remedy for non-agency action was within Congress' contemplation in enacting the APA and particularly § 704, the court below provided no analysis of the intended relationship between FHA administrative enforcement and the private remedy, nor the adequacy, or lack thereof, of the private remedy.

The Third Circuit in *Mitchell v. Cellone*, 389 F.3d 86, 90-91 (3d Cir. 2004), recently has had occasion to consider HUD's mandatory enforcement duties under the FHA and the legislative history accompanying the expansion of these

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[2] The APA entitles a person to judicial review who has suffered a "legal wrong because of agency action," or alternatively is "aggrieved by agency action." 5 USC § 702. In relevant part § 704 expressly considers whether there is another adequate remedy for review under the APA of "final agency action." The APA does not provide for review of private action and is not concerned with alternative review of such action. In this regard see Part B infra.

duties in 1988. The court noted that Congress found the FHA's private enforcement remedy, as originally enacted in 1968, was a "primary weakness of the FHA" and "moved to strengthen the FHA through the 1988 amendments[']... addition of section 3610, the administrative enforcement mechanism." This was because Congress recognized that most affected by discrimination "did not have the resources to privately enforce th FHA." "It was envisioned that this administrative mechanism would become the *primary* means of enforcing FHA claims..." (emphasis added)[3] The court in *Mitchell* concluded, "The statements of the House Judiciary Committee, when coupled with Title VIII's goal of ending discrimination in housing, support a finding that the methods of FHA enforcement should be construed broadly by the courts."

Pursuant to the FHA, HUD is required to conduct an investigation upon the receipt of a timely filed administrative complaint and, absent conciliation, determine "*based on the facts*" whether reasonable cause exists to believe that a discriminatory housing practice has occurred. 42 USC § 3610(a)(1)(B)(iv) and (g) (emphasis added). See also HUD's

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[3] The House Report specifically stated with respect to the prior private enforcement scheme,

> Existing law has been ineffective because it lacks an effective enforcement mechanism. Private persons and fair housing organizations are burdened with primary enforcement responsibility. Although private enforcement has achieved some success, it is restricted by the limited financial resources of litigants and the bar and by disincentives in the law itself. The federal enforcement role is severely limited.

1988 U.S.C.C.A.N. 2173, 2177. In addition, Chairman of the Committee on the Judiciary, Peter Rodino, stated:

> Private enforcement in the courts, with occasional help from the Department of Justice, has not worked to rectify these injustices. I doubt that it ever would. Such redress is simply beyond the means of most victims. H.R. 1158 will put teeth into existing law. It gives meaning to the law. No longer will a victim of discrimination have to go to Federal court to seek redress. That will now be the job of the Justice Department. All litigating authority will reside in the Department. The victims of bias will have at last an effective, affordable weapon in their battle for equal housing opportunity.

134 Cong. Rec. H6491-02, 1988 WL185128 at pp. 27-28 (Aug. 8, 1988).

duly promulgated regulations at 24 CFR § 103.400(a)(1) and (2) which reinforce that this determination "shall be based solely upon the facts concerning the alleged discriminatory housing practice." If the Secretary determines that reasonable cause exists, he "shall...immediately" issue a charge which commences an enforcement proceeding. 42 USC §§ 3610(g)(2) and (h) and 3612. If an administrative law judge or district court then finds that a discriminatory housing practice has occurred, relief shall be ordered which may include actual damages, injunctive relief and either civil penalties or punitive damages. 42 USC §§ 3612(g)(3) and (o) and 3613(c). Civil penalties are fixed by statute and are to increase if additional discriminatory housing practices are engaged in by the respondent, regardless of the particular victim. 42 USC § 3612(g)(3).

Once an administrative complaint is timely filed pursuant to 42 USC § 3610(a)(1)(A)(i), the FHA allows only two exceptions to this mandatory enforcement scheme: one, if a conciliation agreement, which "shall seek to protect the interests of the aggrieved person, other persons similarly situated, and the public interest" (24 CFR § 103.310(a)), is approved by the Secretary, 42 USC § 3610(g)(1); and two, if a trial has begun in "a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to [the alleged] discriminatory housing practice." 42 USC § 3610(g)(4).

It is thus clear that through the amendments to the FHA, specifically 42 USC §§ 3610 and 3612, Congress has mandated that a comprehensive, administrative enforcement mechanism be made available to those aggrieved by discriminatory housing practices and that such persons should no longer be restricted to the inadequate, private enforcement mechanism existing prior to 1988. Yet HUD has argued that because of the very existence of this inadequate, private enforcement scheme, the Secretary may deny administrative enforcement without regard to the facts of the discriminatory housing practice and has argued that that denial cannot be judicially reviewed

under the APA. Such would deny victims of discriminatory housing practices the resources provided by Congress which it determined to be necessary for effective enforcement. This would also effectively deny aggrieved persons the election of procedures expressly provided by the FHA. Contrary to the FHA's specific terms, the option to proceed administratively and secure needed investigative and prosecutorial assistance would be at HUD's discretion.

A discrimination victim's private remedy against the alleged discriminator under § 3613 cannot in any event be regarded as an adequate alternative to the APA's review of agency action because a court in a § 3613 proceeding cannot order an administrative investigation and cannot order prosecutorial assistance should there be reasonable cause to believe that a discriminatory housing practice has occurred. Contrary to the will of Congress, the entire burden for enforcement would fall on the aggrieved person. As a result of the unreviewed decision of HUD, victims of discrimination would also need to bear this burden in the forum and at the time that the alleged discriminator chooses (the one year to file an administrative complaint notwithstanding, 42 USC § 3610(a)(1)(A)(i)).

The authority relied on by the Court of Appeals and the decisions upon which they are based all involved complaints regarding *discretionary* decisions not to take enforcement action.

The panel below relied on *Godwin v. Secretary of Housing and Urban Development*, 356 F.3d 310, 312 (D.C. Cir. 2004) (per curiam) and *Marinoff v. U.S. Department of Housing and Urban Development*, 892 F.Supp. 493, 497 (S.D. N.Y. 1994) *aff'd*, 78 F.3d 64 (2d Cir. 1996) (per curiam) in determining that the private remedy available to victims of FHA violations (42 USC § 3613) is an "other adequate remedy in a court" which bars APA review (449 F.3d at 540, citing 5 USC § 704). *Godwin* involved a plaintiff who was dissatisfied with the results of the HUD determination of no probable cause and sought to review this determination.

The plaintiff in *Marinoff* sought review of the HUD investigation, claiming that it was inadequately carried out. HUD is under no duty to reach the results a complainant seeks when conducting an investigation and determining whether there is reasonable cause to believe, based solely on the fact of the alleged discriminatory practice, that such practice has occurred. In the present case, the Petitioner does not seek to challenge the investigation or determination of no reasonable cause based on the facts of the alleged discriminatory housing practice, since no such determination was ever made. Instead, she seeks a review of HUD's failure to make this determination.[4]

The cases upon which *Godwin* and *Marinoff* rely beginning with *Hall v. EEOC*, 456 F.Supp. 695 (N.D. Cal. 1978) and *Council of and for the Blind v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983), solely or principally involved discretionary agency enforcement of non-discrimination provisions. In each case the court reviewed the statutory enforcement scheme involved and determined that the private remedy available was intended by Congress to be the course complainants must take if dissatisfied with the adequacy of the agency enforcement.

In both statutory schemes involved (Title VII and the Revenue Sharing Act respectively), Congress had provided for private enforcement to be available if and when administrative enforcement did not first move forward. With regard to Title VII, the court in *Hall* relied on this Court's review of the legislative history in *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 365 (1977), specifically quoting the Conference Committee Report as follows: "[T]he provisions...

[4] HUD believes that a legal determination of res judicata should suffice in meeting its duty. (Brief for Appellee before the Court of Appeals at p. 16). The court below also noted at 540, n.7 that HUD was not required to issue a charge because "it concluded the proceeding before it with a 'Determination of No Reasonable Cause.'" But as the court recognized earlier, the issue was whether HUD made a reasonable cause determination based on the facts or "solely on the facts." 449 F.3d at 537. In either event, whether HUD met its mandatory duty or not is precisely the review the APA calls for.

allow the person aggrieved to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution." 118 Cong.Rec. 7168 (March 6, 1972). 456 F.Supp. at 699. Similarly in *Council of and for the Blind*, the court noted that the private remedy was made available if and when "the ORS [(Office of Revenue Sharing)] *'fails to issue a determination' within the ninety day period* or if it determines the recipient has 'not failed to comply' with the non-discrimination provision," citing 31 USC § 1244(d). 709 F.2d at 1527 and n. 40 (emphasis in the original). The court additionally noted that: "Congress foresaw the allegedly illegal activity of which appellants complain and it adopted a remedy for the agency action in question which it considered adequate. We defer to the Congressional judgment..." Id. at 1532 n. 75.

The court in *Council of and for the Blind* principally considered claims that the ORS failed "to impose sanctions or take other steps effectively to enforce the 'civil rights enforcement program.'" "[E]xtremely broad based" relief was sought. Id. at 1524. However, included within their general challenge of failure to adequately enforce, the appellants therein did raise two specific statutory duties, the first " 'to adhere to statutory and regulatory time limits' " and the second " 'to issue notices of non-compliance after receiving holdings' that the local governments were engaged in illegal discrimination." Id. at 1524 and n. 13. The court addressed the former by concluding that Congress had made available a private remedy specifically with the potential for agency failure to act timely in mind. Id. at 1527. The court did "not decide whether a person aggrieved by conduct of a revenue sharing fund recipient that violates section 122(a) could bring an action directly against the ORS" for refusal "to proceed against the local government as required by 31 USC § 1242(b) (1976)" "*after* the ORS received a 'holding' as defined in 31 USC § 1242(c)(1) or a 'finding,' as defined in section 1242(c)(4)" because no one remaining in the suit had standing to raise this claim. Id. at 1524, n. 13 and 1530 n. 67 ("Our decision

deals only with the situation in which it is alleged that the ORS has failed adequately to investigate or respond to administrative complaints or take steps to increase its capability to do so." Id. at 1530, n.67). "It is an action... to perform their statutory duties generally, rather than in a few specific instances." Id. at 1521, n. 21 (citation omitted)).

Bowen had not been decided at the time the *Hall* and *Council of and for the Blind* decisions were rendered. Thus its analysis of § 704's other adequate remedy exception to judicial review and particularly its application of the presumption of reviewability to the § 704 consideration was not then available. Nor was the intervening *Heckler v. Chaney* decision which, as previously noted, ruled that this presumption of reviewability did not apply to discretionary decisions not to take enforcement action. Instead, as noted, a presumption of unreviewability in this instance applied. Thus, *Heckler v. Cheney* would have supplied an appropriate, if not more appropriate, basis to decide these cases. To the extent *Council of and for the Blind* addressed a mandatory duty, and thus *Heckler v. Chaney* would not have been applicable, the legislative intent evident in the establishment of the Revenue Sharing Act's enforcement scheme may well have been sufficient to overcome the presumption of reviewability.

The FHA's enforcement scheme stands in stark contrast to the statutory enforcement schemes at issue in *Hall* and *Council of and for the Blind*. The administrative enforcement provisions were added in 1988 to supplement the private enforcement remedy, not vice versa. The administrative enforcement provisions were added precisely because of Congress' recognition that the private remedy was inadequate, as placing too heavy a burden on victims, most of whom do not "have the resources to privately enforce the FHA." See *Mitchell*, 389 F.3d at 90, and the legislative history cited therein. It was envisioned that the FHA's "administrative mechanisms would become the primary means of enforcing FHA claims." 389 F.3d

at 90-91 (citing the House Report (Judiciary Committee), 1988 U.S.C.C.A.N. 2173, 2178).[5]

Principally because *Hall* and *Council of and for the Blind* and the cases which have followed these decisions have involved discretionary enforcement decisions, but also because they have largely involved enforcement schemes wholly different than that arising under the FHA, they should not determine the applicability of judicial review under the APA in the present case. Given *Heckler v. Cheney*, the Petitioner does not disagree with the results of the *Godwin* and *Marinoff* rulings. However, extending

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[5] Although the FHA's enforcement provisions were originally similar to those in the Revenue Sharing Act at issue in *Council of and for the Blind*, there is indication from the outset that Congress intended broad APA review of HUD enforcement decisions. See the Senate Report dated February 6, 1968, 114 Cong. Rec. 2273. In relevant part this states:

> *5. How will the Act be enforced?*
>
> Primary responsibility for enforcement is vested in the Department of Housing and Urban Development. It will establish local offices throughout the country for this purpose as needed. The Department will employ hearing examiners, who will be appointed and will serve in accordance with the Administrative Procedure Act.
>
> Persons who believe they have been discriminated against may file a charge with the Department. If the Department decides to process the charge, it will so notify the person. If it decides not to, or fails to give notice within 30 days, the person can bring his own action in any court of competent jurisdiction.
>
> The Department must always first try to settle a charge voluntarily, by conciliation and agreement. Only if that fails can it issue a complaint and hold hearings.
>
> The Attorney General will also be empowered to enforce the Act, but only when a "pattern or practice" of resistance to its provisions is found to exist.
>
> *6. Will persons who disagree with the Department of Housing and Urban Development's interpretation of the Act have any recourse?*
>
> All orders of the Department will be subject to review by the Federal courts. In addition, the Department will be subject to the provisions of the Administrative Procedure Act in all its operations under the Fair Housing Act.

It is also apparent that, unlike the Office of Revenue Sharing (see *Council*, 709 f.2d at 1530-1531 and 1534), Congress supplied HUD with the resources to carry out this enforcement role.

these rulings further to encompass allegations of agency breach of specific, mandatory statutory duties, as was presented in the present case, is directly contrary to this Court's decision in *Bowen v. Massachusetts*.

B. An Important Question of Federal Law has not been, but Should be, Settled by this Court.

A more fundamental question is presented by the decision below regarding the proper interpretation of § 704. Was the decision below and earlier decisions upon which it relied improperly based on the availability of alternative forums to address legal wrongs caused by non-agency action, as opposed to alternative forums available to address "legal wrongs because of agency action," (§ 702) which is the focus of the APA and § 704? As otherwise stated, was it Congress' intent that the issue to be decided is whether there is an alternative to judicial review of the agency action under the APA, not whether there is an alternative to the agency action available to the aggrieved person to enforce the underlying statute? Petitioner submits that it is not available to a court considering an action under the APA to determine that the plaintiff has suffered a more critical injury due to the conduct of the non agency actor and then focus the alternative remedy inquiry on the non agency action. It is enough under the APA that the plaintiff has suffered "legal wrong because of agency action" or has been "adversely affected by agency action within the meaning of a relevant statute." If so, this person is "entitled to judicial review thereof" (§ 702).

Mindful that *Hall* and *Council of and for the Blind* were decided before *Bowen*, yet likely reached a correct result due to the intervening *Heckler* decision, their interpretation of § 704 is nevertheless questioned, because subsequent decisions including the decision of the court below relied on their interpretation. The proper reading of the express terms of § 704, particularly when read together with the underlying entitlement to review terms of § 702 (as required as a matter of statutory construction (*Heckler*,

470 U.S. at 829)), compel the conclusion that the phrase "no other adequate remedy in a court" can only refer to the agency action at issue and should only consider whether there is an adequate alternative to the APA's review of this agency action. Only when one satisfies the §702 entitlement to review standard, is § 704 a consideration. As APA review does not address the non agency actor's conduct which is the focus of the relevant statute, § 704 does not consider whether there are alternatives to the agency action in addressing the non agency actor's conduct. The alternative is to judicial review, not the agency action itself.

Council of and for the Blind has been read as interpreting the APA "'to bar suits where a plaintiff's injury may be remedied in another action, even if that remedy would have no effect upon the challenged agency action.'" *Coker v. Sullivan*, 902 F.2d 84, 90 n.5 (D.C. Cir. 1990)(citation omitted).[6] Yet this interpretation was without apparent consideration of the express terms of § 702 considered together with § 704 and was without the benefit of this Court's discussion of the legislative history which accompanied § 704, as relied upon by the Court in *Bowen*. In enacting § 704, Congress sought to avoid duplication of "previously established special statutory procedures relating to specific agencies" (*Bowen*, 487 U.S. at 901), not all private remedies that may be available against non-agency actors who have allegedly violated the law.

The injury brought to the Court in the present case is the denial of a reasonable cause determination based solely on the facts following an investigation, and subsequent prosecutorial assistance if such reasonable cause is found. This Court in *Dunlop* determined the identical denial to constitute a legal wrong subject to review, 421 U.S. at 567 and n.7, but did not consider a § 704 issue. The court in *Council of and for the Blind* expressly did not reach this

[6] The court in Coker properly decided at the outset that review was not available pursuant to *Heckler*. 902 F.2d at 88. It did not need to reach the § 704 issue.

issue, as it pertained to a mandatory duty, because of a lack of standing. 709 F.2d at 1530. n. 67.

This important issue has not been previously addressed by this Court to the Petitioner's knowledge. It should be in order to provide proper focus to the courts below as they are called upon to make fundamental decisions regarding their jurisdiction.

CONCLUSION

Both *Bowen v. Massachusetts* and *Heckler v. Chaney* require that the determination of judicial review of agency action under the APA take into account and follow Congressional intent as evidenced in the statute, which is the subject of the review being sought, and its legislative history. The court below failed to do so. *Bowen* additionally requires that § 704 be interpreted so as not unduly to restrict judicial review; yet this is precisely what the court below has done. Review of this decision on certiorari not only "promotes fidelity to statutory requirements" (*Bowen*, 487 U.S. at 908, n. 46, quoting Judge Wright of the Delaware District Court in *Delaware Div. of Health and Social Services v. HHS*, 665 F. Supp. 1104, 1117-1118 (D. Del. 1987)), but is necessary in order to address fundamental issues regarding the jurisdiction of the district courts.

Respectfully submitted,
Donald Driscoll
Evalynn B. Welling
Community Justice Project
Suite 1705 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15219
412-434-6012

Counsel for Petitioner

Dated: October 30, 2006

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2169

DEANNA TURNER,

Appellant

v.

THE SECRETARY OF THE UNITED
STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 04-cv-01379)
Honorable Gary L. Lancaster, District Judge

Submitted under Third Circuit LAR 34.1(a)
March 6, 2006

BEFORE: ROTH AND GREENBERG, *Circuit Judges*,
and
BUCKWALTER, *District Judge**

(Filed May 31, 2006)

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*Honorable Ronald L. Buckwalter, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Donald Driscoll
Evalynn B. Welling
Community Justice Project
1705 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15219
Attorneys for Appellant

Mary Beth Buchanan
United States Attorney
Laura S. Irwin
Assistant United States Attorney
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
Attorneys for Appellee

OPINION OF THE COURT

GREENBERG, *Circuit Judge*

I. INTRODUCTION

This matter comes on before the court on an appeal by Deanna Turner from an order of the district court entered March 30, 2005, dismissing her action against the Secretary of the United States Department of Housing and Urban Development ("HUD"). In this case Turner alleged that HUD failed to perform mandatory duties that the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, imposed on it with respect to her status as a residential lessee.[1] In particular, Turner alleged that in ruling on a complaint she filed with HUD against her landlord, HUD did not determine from an analysis of the facts whether she had been a victim of a discriminatory housing practice. Instead, relying on the res judicata effect of a judgment

[1] We discuss the history of the FHA in *Mitchell v. Cellone*, 389 F.3d 86 (3d Cir. 2004).

in favor of her landlord in a state court proceeding, HUD dismissed her complaint as it found no reasonable cause for the complaint. That unfavorable outcome in the HUD proceeding led Turner to bring this action against HUD. The district court dismissed Turner's action as it believed that the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, did not provide for judicial review of HUD's determination. For the reasons set forth below, we will affirm the order of dismissal.

II. FACTUAL AND PROCEDURAL HISTORY

Turner filed the complaint with HUD leading to this litigation on December 14, 2001, alleging that she was the victim of various discriminatory housing practices in which her landlord, Crawford Square Apartments III, L.P. ("Crawford Square"), engaged in violation of the FHA.[2] Prior to and after filing her HUD complaint, Turner was involved in proceedings before the Court of Common Pleas of Allegheny County, Pennsylvania, stemming from Crawford Square's attempts to evict her and her attempts to thwart her eviction. Crawford Square initiated the state

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[2] Turner's December 14, 2001 HUD complaint was her second such complaint; she filed the first with HUD on January 5, 2001. She specifies, however, that the December 14, 2001 complaint forms the basis for this action and appeal.

Turner stated in her district court complaint that she filed her December 14, 2001 HUD complaint against "Crawford Square." Although she has not included the complaint in her appendix on this appeal, we have examined the complaint which is included in the appendix filed in Turner's related appeal, *Turner v. Crawford Square Apartments III, L.P., et al.*, No. 05-1979, and observe that it shows that Turner filed the December 14, 2001 complaint against "McCormick [sic] Baron Mngmnt t/a Crawford Square." The reference to McCormack Baron was to McCormack Baron Management Services, Inc., Crawford Square's management company. Her designation of the respondent in her complaint is consistent with the HUD Determination of No Reasonable Cause, which identified McCormack Baron as the respondent in the December 14, 2001 complaint. Turner's failure to identify precisely the party she named as respondent in the underlying HUD proceeding does not impair our ability to adjudicate this appeal because for our purposes it does not matter whether the respondent was Crawford Square or McCormack Baron, or even whether both entities were respondents.

court proceedings by reason of Turner's delinquency in rent payments, and Turner responded in the state court with various state law counterclaims and a petition for injunctive relief to block her eviction. Turner, however, did not raise the FHA claims underlying her HUD complaint in the state court. On September 30, 2003, following a four-day trial, the court of common pleas found in favor of Crawford Square, rejecting all of Turner's claims and defenses on the merits.

After the state court adjudication, HUD sent Turner a "Determination of No Reasonable Cause," dated August 12, 2004, in which HUD explained that "[b]ased on the evidence obtained during the investigation, [HUD] has determined that reasonable cause does not exist to believe that a discriminatory housing practice has occurred" and that her complaint therefore must be dismissed. S.A. at 1.[3] HUD enclosed with its letter a "determination" on which it based its decision in which it explained "that the present investigation should be dismissed under the legal doctrine of res judicata," predicated on the state court proceedings because "HUD conclude[d] that this constitute[d] a successful defense against the present complaint." *Id.* at 7.

Nevertheless, HUD informed Turner that "[n]otwithstanding this dismissal by HUD, the [FHA] provides that the complainant may file a civil action in an appropriate federal district or state court." *Id.* at 1. A few days later, on August 18, 2004, Turner did just that, bringing a private action ("*Turner* I") against her landlord, Crawford Square, and its management company, McCormack Baron Management Services, Inc., ("McCormack Baron"), in the district court alleging violations of the FHA. The district court, however, granted summary judgment in favor of the defendants in *Turner* I by an order entered March 22, 2005, on the basis of the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 150

[3] S.A. refers to the supplemental appendix that HUD filed.

(1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483-84, 103 S.Ct. 1303, 1316 (1983). In the district court's view, application of that doctrine barred Turner from challenging the state court adjudication and thereby deprived the district court of subject matter jurisdiction over her action against Crawford Square and McCormack Baron. Turner then appealed, and we are affirming the dismissal of her action on the ground of res judicata inasmuch as Turner's FHA claims in the district court in *Turner* I involved the same cause of action as her previously-adjudicated state court claims that had been resolved against her. *See Turner v. Crawford Square Apartments III, L.P.*, No. 05-1979, *Turner* I. Nevertheless, as we explain in our opinion in *Turner* I, we are rejecting the district court's view that the *Rooker-Feldman* doctrine barred Turner's action in *Turner* I.

On September 10, 2004, Turner filed the present action ("*Turner* II") against HUD, alleging that it failed to undertake certain mandatory duties affecting her interests that the FHA and its implementing regulations imposed on it. In particular, Turner alleged that HUD's dismissal of her complaint based on res judicata principles violated the statutory mandate requiring it to complete an investigation and determine, based on the facts concerning the alleged discriminatory practices, whether there was reasonable cause to believe that she had been the victim of discriminatory practices. Turner claims that HUD completed its investigation but wrongfully withheld the mandated determination of whether there was reasonable cause to believe that there were discriminatory housing practices.

On November 10, 2004, HUD moved to dismiss Turner's complaint in this case, *Turner* II, under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court granted the motion, concluding that the APA did not include a provision from which the court could find a basis for allowing judicial review of HUD's disposition of Turner's

complaint. In particular, the district court determined that the APA permitted judicial review only for "final agency action for which there is no other adequate remedy in a court," and that Turner "had an adequate remedy" in court, as evidenced by her district court suit against Crawford Square and McCormack Baron on *Turner* I. *See* App. at 8-10.[4] The district court also noted that even if review were appropriate under the APA, there was a "strong presumption" against judicial review of agency decision concerning whether to undertake enforcement actions. *Id.* at 9-10. Lastly, the district court, acting consistently with its adjudication in *Turner* I, explained that application of the *Rooker-Feldman* doctrine provided an alternative ground compelling dismissal.

Turner then filed a timely notice of appeal in *Turner* II on April 11, 2005. By this opinion we adjudicate the appeal.

III. JURISDICTION AND STANDARD OF REVIEW

The parties dispute whether the district court had jurisdiction, Turner asserting that it had jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1361 (All Writs Act), and HUD claiming that it did not have jurisdiction. We, however, have jurisdiction under 28 U.S.C. § 1291, and we exercise plenary review over the district court's dismissal on the grounds that the APA barred judicial review. *See Raymond Proffitt Found. v. United States Army Corps. of Eng'rs*, 343 F.3d 199, 203 (3d Cir. 2003).

IV. DISCUSSION

The APA provides that agency actions are judicially reviewable if they are "made reviewable by statute," or if there was a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Neither party points to any statute making HUD's determination

[4] "App." refers to the appendix that Turner filed.

with respect to Turner's complaint reviewable,[5] but they disagree as to whether HUD rendered a "final agency action for which there is no other adequate remedy in a court." This question implicates section 813 of the FHA, 42 U.S.C. § 3613(a)(2), which authorizes private suits directly against perpetrators of allegedly discriminatory practices, even if, as here, HUD renders a determination that there was no reasonable cause to believe that there had been discrimination. *See* 42 U.S.C. § 3613(a)(2).[6]

Other courts that have confronted situations like those arising from Turner's action against HUD, have held that section 813 provides an "other adequate remedy in a court" barring judicial review under the APA.[7] *See Godwin*

[5] In fact, HUD's determination was not reviewable pursuant to statute. *See Godwin v. Sec'y of Hous. and Urban Dev.*, 356 F.3d 310, 312 (D.C. Cir. 2004) (per curiam).

[6] Although we uphold the district court's order dismissing this action because we conclude that Turner had another "adequate remedy" in court, we consider the *Rooker-Feldman* doctrine in accordance with the explanation of the doctrine that the Supreme Court set forth in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S.Ct. 1517 (2005). We hold that the *Rooker-Feldman* doctrine is inapplicable in this case for, as the Court set forth in *Exxon Mobil*, the *Rooker-Feldman* doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284, 125 S.Ct. at 1521-22. Inasmuch as, in light of *Exxon Mobil*, there is no possible way that the *Rooker-Feldman* doctrine could be applicable in this case, we summarily reject HUD's reliance on it without further discussion. We, however, point out that the district court did not have the benefit of *Exxon Mobil* when it released its memorandum order dismissing this action as the order was dated March 29, 2005, and was entered on March 30, 2005, the date that the Court decided *Exxon Mobil*.

[7] We have had occasion to note, albeit in dictum, that the FHA provides an adequate judicial remedy barring APA review. *See Am. Disabled for Attendant Programs Today v. U.S. Dept. of Hous. and Urban Dev.*, 170 F.3d 381, 390 (3d Cir. 1999) ("ADAPT") ("Not only does ADAPT fail to point to a final agency action, but an adequate judicial remedy also exists."). While ADAPT arose in an administrative context different from that here, it is worth noting Turner's misplaced reliance on the case. In particular, Turner mistakenly relies on dictum in that case that reads: "If HUD *refused to investigate* a filed administrative

(continued)

v. Sec'y of Hous. and Urban Dev., 356 F.3d 310, 312 (D.C. Cir. 2004) (per curiam); *Marinoff v. U.S. Dept. of Hous. and Urban Dev.*, 892 F.Supp. 493, 497 (S.D.N.Y. 1994), *aff'd*, 78 F.3d 64 (2d Cir. 1996) (per curiam). We agree with those courts.

We hold that section 813 provided Turner with another "adequate remedy" which, in fact, she pursued by filing her action in the district court against Crawford Square and McCormack Baron in *Turner* I.[8] We further hold that she has not been deprived of her "adequate remedy" merely because the district court in *Turner* I dismissed her complaint in an order we are affirming. In this regard we agree with the Court of Appeals for the first Circuit which held that "[a] legal remedy is not inadequate for purposes of the APA because it is procedurally inconvenient for a given plaintiff, or because plaintiffs have inadvertently deprived themselves of an opportunity to pursue that remedy." *Town of Sanford v. United States*, 140 F.3d 20, 23 (1st Cir. 1998); *See also Martinez v. United States*, 333 F.3d 1295, 1319-20 (Fed. Cir. 2003) ("The fact that the complaint was untimely filed...does not mean that that court could not offer a full and adequate remedy; it merely means that [plaintiff] did

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claim, it could result in a violation of its duty...and trigger review by a court," *id.* at 390 (emphasis added). Appellant's br. at 10. But this dictum is clearly inapplicable here because, as Turner correctly concedes in her complaint in *Turner* II, HUD did undertake – and complete – an investigation. Thus, Turner uses the dictum regarding "refus[al] to investigate a filed administrative claim," to bootstrap an argument regarding HUD's decision not to bring an enforcement action, an issue which we did not address in ADAPT.

We also note that Turner points to our statement in *ADAPT* that following the filing of an administrative complaint HUD has a "mandatory" duty to investigate the complaint and if it finds in the investigation that there is a reasonable basis for the complaint, it "must bring a charge on behalf of the aggrieved person." *Id.* at 387. That language cannot help Turner because HUD did investigate the complaint but it concluded the proceeding before it with a "Determination of No Reasonable Cause."

[8] Our result would have been the same even if Turner had not filed suit in *Turner* I as her failure to seek her remedy would not have meant that she did not have an "adequate remedy in a court."

not file his complaint in time to take advantage of that remedy."); *Sable Commc'ns of California, Inc. v. FCC*, 827 F.2d 640, 642 (9th Cir. 1987).

The decisions of the Courts of Appeals for the Federal Circuit in *Martinez* and for the Ninth Circuit in *Sable Communications* are illustrative of the principle that, for purposes of section 813, another remedy is not inadequate merely because the complainant cannot pursue it successfully. In each case the court of appeals held that the plaintiff had an adequate judicial remedy barring APA review notwithstanding the fact that the plaintiff had forfeited the right to that remedy by failing to pursue it in a timely manner. *Martinez*, 333 F.3d at 1320; *Sable Commc'ns*, 827 F.2d at 642. Like the plaintiffs in *Martinez* and *Sable Communications*, Turner was not successful in her section 813 action under the FHA, though for a different reason. Nevertheless, she had an opportunity to bring her case and her lack of success in it was attributable to her loss in the underlying action between her and Crawford Square and McCormack Baron in the state court.[9]

V. CONCLUSION

Inasmuch as we have concluded that 5 U.S.C. § 704 bars the judicial review sought in this action, we need not address the question of whether 5 U.S.C. § 701(a)(2), which precludes review of agency action "committed to agency discretion by law," compels dismissal of Turner's complaint. For the foregoing reasons we will affirm the order of March 30, 2005.

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[9] To the extent that *Godwin*, 356 F.3d at 312-13, may be read as being inconsistent with this opinion because it indicates that "a private action remains available...because the two-year statute of limitations... has not run" we decline to follow that case. On the other hand, *Godwin*, by observing that the statute of limitations had not run on a private action, might not have been implying that its result would have been different if it had run. In that event our result would be consistent with *Godwin*.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEANNA TURNER, *Plaintiff,* v. THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Defendant.*	)	Civil Action No. 04-1379

MEMORANDUM ORDER

Gary L. Lancaster,
District Judge.
March 29, 2005

This is a civil rights case. Plaintiff, who resides in an apartment owned and managed by a corporation that receives federal funding, claims that she is disabled and that her landlord, Crawford Square Apartments ("Crawford Square"), failed to reasonably accommodate her by refusing to accept her Section 8 voucher. Defendant has filed a motion to dismiss pursuant to Fed.R.Civ.Proc. 12(b)(6), for failure to state a claim on which relief can be granted, and Fed.R.Civ.Proc. 12(b)(1), for lack of subject matter jurisdiction. Although the court is sympathetic to plaintiff's predicament, defendant's motion to dismiss must be granted.

I. BACKGROUND

Plaintiff moved into her Crawford Square apartment in December 1999. She was able to pay her rent on time for about a year. In August 2000, however, she had to leave her job because of multiple disabilities including spina bifida. Soon thereafter, she began having financial difficulties and could not meet her rent obligations. Her landlord took steps to evict her in January 2001 for non-payment of the December 2000 and January 2001 rent.

On January 5, 2001, plaintiff filed a complaint with the United States Department of Housing and Urban Development ("HUD") pursuant to the Fair Housing Act ("FHA"), asserting that Crawford Square had failed to make a reasonable modification to its rules, policies, practices, and services in order to allow her an equal opportunity to continue to reside in her apartment. In October 2001, plaintiff offered her landlord a Section 8 voucher. However, she was not able to pay her October 2001 rent. She sought assistance from the Urban League of Pittsburgh, an organization that offers financial assistance in the form of rent payments to clients such as plaintiff. Unfortunately, by the time she was able to secure an appointment with the Urban League, her landlord had already refused her Section 8 voucher because plaintiff was in arrears on her rent.[1]

Plaintiff filed another FHA complaint with HUD against her landlord on December 14, 2001, this time alleging discriminatory application of Crawford Square's late payment and eviction rules against plaintiff; failure to make reasonable modification to its rules, policies, practices, and services by accepting the Section 8 voucher even though plaintiff was late paying her rent; and retaliation against plaintiff for having filed the January 2001 FHA complaint against Crawford Square.

[1] As of December 22, 2004, the date on which the landlord filed a motion for summary judgment in a related case, plaintiff was still in possession of her apartment on defendants' premises, and had not paid rent since September 2001.

Crawford Square, meanwhile, pursued plaintiff's eviction through the Court of Common Pleas of Allegheny County. Plaintiff responded by filing complaints and/or counterclaims in the United States Bankruptcy Court for the Western District of Pennsylvania, the Court of Common Pleas of Allegheny County, and the Western District of Pennsylvania. All of the litigation instituted by plaintiff revolves around Crawford Square's refusal to accept her Section 8 voucher and its attempts to evict her. In case LT 01-000382, GD 03-003597 before the Court of Common Pleas of Allegheny County, plaintiff alleged that Crawford Square discriminated against her when it failed to accept her Section 8 voucher. Judgment was entered against plaintiff in that case, and possession of the premises was awarded to defendant Crawford Square. Additionally, plaintiff was ordered to pay back rent.

On August 12, 2004, HUD rendered a decision on plaintiff's complaint, finding that reasonable cause did not exist to believe that a discriminatory housing practice had occurred and, accordingly, dismissed plaintiff's complaint. HUD found that because plaintiff could have litigated her FHA claims in her September 2003 trial before the Court of Common Pleas of Allegheny County, and because any successful prosecution by HUD would necessarily nullify the judgment of that court, plaintiff was precluded from obtaining relief from HUD.

II. STANDARD OF REVIEW

Defendant's motion to dismiss cites both Fed.R.Civ. Proc. 12(b)(6) and Fed. R.Civ.Proc. 12(b)(1) as appropriate grounds for dismissal.

A. Rule 12(b)(6)

When the court considers a Rule 12(b)(6) motion to dismiss, the issue is not whether plaintiff will prevail in the end or whether recovery appears to be unlikely or even

remote. The issue is limited to whether, when viewed in the light most favorable to plaintiff, and with all well-pleaded factual allegations taken as true, the complaint states any valid claim for relief. *See ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994). In this regard, the court will not dismiss a claim merely because plaintiff's factual allegations do not support the particular legal theory he advances. Rather, the court is under a duty to examine independently the complaint to determine if the factual allegations set forth could provide relief under any viable legal theory. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 n.40 (2d ed. 1990). *See also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

B. Rule 12(b)(1)

A district court may grant a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on the legal insufficiency of a claim. Dismissal is appropriate where the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or...is wholly insubstantial and frivolous." *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3d. Cir. 1991), citing *Bell v. Hood*, 327 U.S. 678 (1946). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666, (1974) (claim must be "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy"). "When a defendant attacks subject matter jurisdiction 'in fact' as opposed to an attack on the allegations on the face of the complaint, the Court is free to weigh the evidence and satisfy itself whether it has power to hear the case." *Carpet Group Int'l. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d. Cir. 2000), citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). In such circumstance, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional

claims." *Mortensen* at 891. Further, the burden of proving the existence of subject matter jurisdiction lies with the plaintiff. *Id.*

III. DISCUSSION

Defendant argues that the court should grant his motion to dismiss on three grounds. First, he argues that plaintiff has no cause of action under the FHA. Second, he argues that plaintiff cannot establish jurisdiction under the Administrative Procedures Act ("APA") because plaintiff has an adequate remedy in court. Third, he argues that plaintiff is not entitled to judicial review because HUD's decision not to undertake an enforcement action with respect to plaintiff's FHA complaint is a matter committed to agency discretion by law.

Plaintiff, on the other hand, offers two grounds on which defendant's motion to dismiss should be denied. First, plaintiff asserts that she seeks to compel agency action unlawfully withheld and for which there is no other adequate remedy. Second, she proffers that HUD's decision regarding whether or not undertake enforcement action with respect to her FHA complaint is subject to the express standards set out in the FHA and is thus reviewable.

The court finds that plaintiff has not established that judicial review is appropriate in this case. As such, the motion to dismiss will be granted.

A. Sovereign Immunity

Plaintiff asserts that the court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1361 – federal question and mandamus, respectively. As defendant correctly points out, the United States enjoys sovereign immunity from suit, except when it waives that immunity. *U.S. v. Mitchell,* 436 U.S. 206 (1983). Neither § 1331 nor § 1361 waive the United States' sovereign immunity.

Plaintiff attempts to invoke the waiver of sovereign immunity provided by the Administrative Procedures Act ("APA"). However, that waiver is limited to judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. *See American Disabled for Attendant Programs Today (ADAPT), et al. v. HUD,* 170 F.3d 381, 389 (3d Cir. 1999).

In this case, plaintiff had an adequate remedy at court – she could (and did) assert a claim directly against her landlord for the alleged discrimination. In fact, the Court of Appeals for the Third Circuit, in affirming a district court's decision to decline judicial review, had held that "an adequate judicial remedy...exists...[when plaintiffs] can pursue their claims of housing discrimination directly against federal-funding recipients..." *ADAPT* at 390. Accordingly, the APA does not provide a waiver to sovereign immunity here, and the court therefore may not review this case.

The court notes parenthetically that even if it was permitted to review this case pursuant to the APA, there is a strong presumption, established by the Supreme Court, "against judicial review of agency decisions that involve whether or not to undertake investigative or enforcement actions." *ADAPT* at 384, citing *Heckler v. Chaney,* 470 U.S. 821, 838 (1985). In *Chaney*, the Supreme Court stated that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32.

B. Rooker-Feldman

Furthermore, even if judicial review were appropriate, the court would be compelled to grant defendant's motion to dismiss in light of the *Rooker-Feldman* doctrine. That doctrine provides that federal district courts lack subject matter jurisdiction to review a final decision of a state's highest court or to evaluate constitutional claims that are inextricably intertwined with the state court's decision in

a judicial proceeding. *Blake v. Papadakos*, 953 F.2d 68, 71 (3d Cir. 1992) (citing, *inter alia*, *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923)). The doctrine encompasses final decisions of lower state courts as well. *Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J. Police Dep't*, 973 F.2d 169, 177-78 (3d Cir. 1992).

When a plaintiff seeks to litigate a claim in a federal court, the existence of a state court judgment in another case bars the federal proceeding under *Rooker-Feldman* when entertaining the federal court claim would be the equivalent of an appellate review of that order. *See Ernst v. Child & Youth Servs. of Chester County*, 108 F.3d 486, 491 (3d Cir. 1997). For that reason, *Rooker-Feldman* applies when, in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render that judgment ineffectual. *Id.* (quoting *FOCUS v. Allegheny Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996)). *See also Marks v. Stinson*, 19 F.3d 873, 885 n.11 (3d Cir. 1994). In other words, *Rooker-Feldman* precludes a federal action if the relief requested in the federal action would effectively reverse the state decision or void its ruling.

This limitation upon federal district court subject matter jurisdiction derives from 28 U.S.C. § 1257, which provides that " ' [f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court...' " *Valenti v. Mitchell*, 962 F.2d 288, 296 (3d Cir. 1992) (citations omitted). In addition to this formal statutory basis for the *Rooker-Feldman* doctrine, there are justifications for the rule:

As with *Younger* abstention, which requires federal courts to abstain when there is a pending state court proceeding, part of the justification for *Rooker-Feldman* is respect for state courts. *See Guarino v. Larsen*, 11 F.3d 1151,

1157 (3d Cir. 1993). Just as federal district courts should presume that pending state court proceedings can correctly resolve federal questions, they should also presume that completed state court proceedings have correctly resolved these questions.

A second justification for *Rooker-Feldman* stems from its similarity to claim preclusion. *See Valenti*, 962 F.2d at 296. Like claim preclusion, *Rooker-Feldman* is partly concerned with finality, with ensuring that litigants do not take multiple bites from the same apple. Once litigants' claims have been adjudicated in the state court system, they should not also have access to the entire federal court system.

If the court were to assert subject –matter jurisdiction over this case, it would be ignoring the clear mandates of the *Rooker-Feldman* doctrine. To do so would be tantamount to reviewing the final decision of the Court of Common Pleas of Allegheny County in case LT 01-000382, GD 03-003597. Such action is barred by *Rooker-Feldman*, as the constitutional claims at issue in this case are inextricably intertwined with the state court's decision in that case. In addition, if the court were to grant plaintiff the relief she seeks, it would necessarily have to take action that would render the state court's decision ineffectual.

Therefore, this 29th day of March, 2005, IT IS HEREBY ORDERED that defendant's motion to dismiss [document # 3] is GRANTED. The Clerk of Courts is ordered to mark this case closed.

BY THE COURT:

/s/Gary L. Lancaster, J.

cc: All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2169

DEANNA TURNER,

Appellant
v.

THE SECRETARY OF THE UNITED
STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 04-cv-01379)
Honorable Gary L. Lancaster, District Judge

Submitted under Third Circuit LAR 34.1(a)
March 6, 2006

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, *Chief Judge*, SLOVITER,
MCKEE, RENDELL, AMBRO, FUENTES, SMITH,
FISHER, VAN ANTWERPEN, CHAGARES,
GREENBERG, and ROTH, *Circuit Judges*, and
BUCKWALTER, *District Judge**

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*Honorable Ronald L. Buckwalter, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

The petition for rehearing filed by appellant, Deanna Turner, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Greenberg's vote, Judge Roth's vote, and Judge Buckwalter's vote are limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: August 1, 2006
DMM/cc: Donald Driscoll, Esq.
Evalynn Welling, Esq.
Laura S. Irwin, Esq.

5 USCS § 701

§ 701. Application; definitions

(a) This chapter [*5 USCS §§ 701* et seq.] applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter [*5 USCS §§ 701* et seq.]--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41 [*41 USCS §§ 101* et seq.]; subchapter II of chapter 471 of title 49 [*49 USCS §§ 47151* et seq.]; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix, and

(2) "person," "rule," "order," "license," "sanction," "relief," and "agency action" have the meanings given them by section 551 of this *title [5 USCS § 551]*.

5 USCS § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 USCS § 704

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there

has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 USCS § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title *[5 USCS §§ 556* and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

§ 3610. Administrative enforcement; preliminary matters

(a) Complaints and answers.

(1) (A) (i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

(ii) Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires.

(iii) The Secretary may also investigate housing practices to determine whether a complaint should be brought under this section.

(B) Upon the filing of such a complaint--

(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this title;

(ii) the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this title, together with a copy of the original complaint;

(iii) each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such complaint; and

(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100

days after the commencement of such further action), unless it is impracticable to do so.

(C) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

(D) Complaints and answers shall be under oath or affirmation, and may be reasonably and fairly amended at any time.

(2) (A) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, under paragraph (1), to such person, from the Secretary.

(B) Such notice, in addition to meeting the requirements of paragraph (1), shall explain the basis for the Secretary's belief that the person to whom the notice is addressed is properly joined as a respondent.

(b) Investigative report and conciliation.

(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.

(2) A conciliation agreement arising out of such conciliation shall be an agreement between the respondent and the complainant, and shall be subject to approval by the Secretary.

(3) A conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. Any such arbitration that results from a conciliation

agreement may award appropriate relief, including monetary relief.

(4) Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this title.

(5) (A) At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing--

(i) the names and dates of contacts with witnesses;

(ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

(iii) a summary description of other pertinent records;

(iv) a summary of witness statements; and

(v) answers to interrogatories.

(B) A final report under this paragraph may be amended if additional evidence is later discovered.

(c) Failure to comply with conciliation agreement. Whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed under section 814 [*42 USCS § 3614*] for the enforcement of such agreement.

(d) Prohibitions and requirements with respect to disclosure of information.

(1) Nothing said or done in the course of conciliation under this title may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned.

(2) Notwithstanding paragraph (1), the Secretary shall make available to the aggrieved person and the respondent, at any time, upon request following completion of the Secretary's investigation,

information derived from an investigation and any final investigative report relating to that investigation.

(e) Prompt judicial action.

(1) If the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this title, the Secretary may authorize a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint under this section. Upon receipt of such an authorization, the Attorney General shall promptly commence and maintain such an action. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with the Federal Rules of Civil Procedure. The commencement of a civil action under this subsection does not affect the initiation or continuation of administrative proceedings under this section and section 812 of this title *[42 USCS § 8612]*.

(2) Whenever the Secretary has reason to believe that a basis may exist for the commencement of proceedings against any respondent under sections 814(a) and 814(c) [*42 USCS § 3614(a)*, (c)] or for proceedings by any governmental licensing or supervisory authorities, the Secretary shall transmit the information upon which such belief is based to the Attorney General, or to such authorities, as the case may be.

(f) Referral for State or local proceedings.

(1) Whenever a complaint alleges a discriminatory housing practice--

(A) within the jurisdiction of a State or local public agency; and

(B) as to which such agency has been certified by the Secretary under this subsection;

the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint.

(2) Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such complaint unless--

(A) the certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of such referral;

(B) the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or

(C) the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction.

(3) (A) The Secretary may certify an agency under this subsection only if the Secretary determines that--

(i) the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;

(ii) the procedures followed by such agency;

(iii) the remedies available to such agency; and

(iv) the availability of judicial review of such agency's action; are substantially equivalent to those created by and under this title.

(B) Before making such certification, the Secretary shall take into account the current practices and past performance, if any, of such agency.

(4) During the period which begins on the date of the enactment of the Fair Housing Amendments Act of 1988 [enacted Sept. 13, 1988] and ends 40 months after such date, each agency certified (including an agency certified for interim referrals pursuant to 24 CFR 115.11, unless such agency is subsequently denied recognition under 24 CFR 115.7) for the purposes of this title on the day before such date shall for the purposes of this subsection be considered certified under this subsection with respect to those matters for which such agency was certified on that date. If the Secretary determines in an individual case that an agency has not been able to meet the

certification requirements within this 40-month period due to exceptional circumstances, such as the infrequency of legislative sessions in that jurisdiction, the Secretary may extend such period by not more than 8 months.

(5) Not less frequently than every 5 years, the Secretary shall determine whether each agency certified under this subsection continues to qualify for certification. The Secretary shall take appropriate action with respect to any agency not so qualifying.

(g) Reasonable cause determination and effect.

(1) The Secretary shall, within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

(2) (A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 812 [*42 USCS § 3612*].

(B) Such charge--

(i) shall consist of a short and plain statement of the facts upon which the Secretary has

found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(ii) shall be based on the final investigative report; and

(iii) need not be limited to the facts or grounds alleged in the complaint filed under section 810(a) [subsec. (a) of this section].

(C) If the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 814 [*42 USCS § 3614*], instead of issuing such charge.

(3) If the Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall promptly dismiss the complaint. The Secretary shall make public disclosure of each such dismissal.

(4) The Secretary may not issue a charge under this section regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

(h) Service of copies of charge. After the Secretary issues a charge under this section, the Secretary shall cause a copy thereof, together with information as to how to make an election under section 812(a) [*42 USCS § 3612(a)*] and the effect of such an election, to be served--

(1) on each respondent named in such charge, together with a notice of opportunity for a hearing at a time and place specified in the notice, unless that election is made; and

(2) on each aggrieved person on whose behalf the complaint was filed.

42 USCS § 3612

§ 3612. Enforcement by Secretary

(a) Election of judicial determination. When a charge is filed under section 810 [*42 USCS § 3610*], a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) in lieu of a hearing under subsection (b). The election must be made not later than 20 days after the receipt by the electing person of service under section 810(h) *[42 USCS § 810*(h)] or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

(b) Administrative law judge hearing in absence of election. If an election is not made under subsection (a) with respect to a charge filed under section 810 [*42 USCS § 3610*], the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 810 [*42 USCS § 3610*]. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under *section 3105 of title 5, United States Code*. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

(c) Rights of parties. At a hearing under this section, each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 811 [*42 USCS § 3611*]. Any aggrieved person may intervene as a party in the proceeding. The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.

(d) Expedited discovery and hearing.

(1) Discovery in administrative proceedings under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the need of all parties to obtain relevant evidence.

(2) A hearing under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the needs and rights of the parties to obtain a fair hearing and a complete record.

(3) The Secretary shall, not later than 180 days after the date of enactment of this subsection [enacted Sept 13, 1988], issue rules to implement this subsection.

(e) Resolution of charge. Any resolution of a charge before a final order under this section shall require the consent of the aggrieved person on whose behalf the charge is issued.

(f) Effect of trial of civil action on administrative proceedings. An administrative law judge may not continue administrative proceedings under this section regarding any alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

(g) Hearings, findings and conclusions, and order.

(1) The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(2) The administrative law judge shall make findings of fact and conclusions of law within 60 days after

the end of the hearing under this section, unless it is impracticable to do so. If the administrative law judge is unable to make findings of fact and conclusions of law within such period, or any succeeding 60-day period thereafter, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(3) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent--

(A) in an amount not exceeding $ 10,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice;

(B) in an amount not exceeding $ 25,000 if the respondent has been adjudged to have committed one other discriminatory housing practice during the 5-year period ending on the date of the filing of this charge; and

(C) in an amount not exceeding $ 50,000 if the respondent has been adjudged to have committed 2 or more discriminatory housing practices during the 7-year period ending on the date of the filing of this charge;

except that if the acts constituting the discriminatory housing practice that is the object of the charge are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, then the civil penalties set forth in subparagraphs (B) and (C) may be imposed without regard to the period of time within which

any subsequent discriminatory housing practice occurred.

(4) No such order shall affect any contract, sale, encumbrance, or lease consummated before the issuance of such order and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the charge filed under this title.

(5) In the case of an order with respect to a discriminatory housing practice that occurred in the course of a business subject to a licensing or regulation by a governmental agency, the Secretary shall, not later than 30 days after the date of the issuance of such order (or, if such order is judicially reviewed, 30 days after such order is in substance affirmed upon such review)--

(A) send copies of the findings of fact, conclusions of law, and the order, to that governmental agency; and

(B) recommend to that governmental agency appropriate disciplinary action (including, where appropriate, the suspension or revocation of the license of the respondent).

(6) In the case of an order against a respondent against whom another order was issued within the preceding 5 years under this section, the Secretary shall send a copy of each such order to the Attorney General.

(7) If the administrative law judge finds that the respondent has not engaged or is not about to engage in a discriminatory housing practice, as the case may be, such administrative law judge shall enter an order dismissing the charge. The Secretary shall make public disclosure of each such dismissal.

(h) Review by Secretary; service of final order.

(1) The Secretary may review any finding, conclusion, or order issued under subsection (g). Such review shall be completed not later than 30 days after the finding, conclusion, or order is so issued; otherwise the finding,

conclusion, or order becomes final.

(2) The Secretary shall cause the findings of fact and conclusions of law made with respect to any final order for relief under this section, together with a copy of such order, to be served on each aggrieved person and each respondent in the proceeding.

(i) Judicial review.

(1) Any party aggrieved by a final order for relief under this section granting or denying in whole or in part the relief sought may obtain a review of such order under chapter 158 of title 28, United States Code *[28 USCS §§ 2341* et seq.].

(2) Notwithstanding such chapter, venue of the proceeding shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred, and filing of the petition for review shall be not later than 30 days after the order is entered

(j) Court enforcement of administrative order upon petition by Secretary.

(1) The Secretary may petition any United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred or in which any respondent resides or transacts business for the enforcement of the order of the administrative law judge and for appropriate temporary relief or restraining order, by filing in such court a written petition praying that such order be enforced and for appropriate temporary relief or restraining order.

(2) The Secretary shall file in court with the petition the record in the proceeding. A copy of such petition shall be forthwith transmitted by the clerk of the court to the parties to the proceeding before the administrative law judge.

(k) Relief which may be granted.

(1) Upon the filing of a petition under subsection (i) or (j), the court may--

(A) grant to the petitioner, or any other party, such temporary relief, restraining order, or other order as the court deems just and proper;

(B) affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and

(C) enforce such order to the extent that such order is affirmed or modified.

(2) Any party to the proceeding before the administrative law judge may intervene in the court of appeals.

(3) No objection not made before the administrative law judge shall be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(l) Enforcement decree in absence of petition for review. If no petition for review is filed under subsection (i) before the expiration of 45 days after the date the administrative law judge's order is entered, the administrative law judge's findings of fact and order shall be conclusive in connection with any petition for enforcement--

(1) which is filed by the Secretary under subsection (j) after the end of such day; or

(2) under subsection (m).

(m) Court enforcement of administrative order upon petition of any person entitled to relief. If before the expiration of 60 days after the date the administrative law judge's order is entered, no petition for review has been filed under subsection (i), and the Secretary has not sought enforcement of the order under subsection (j), any person entitled to relief under the order may petition for a decree enforcing the order in the United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred.

(n) Entry of decree. The clerk of the court of appeals in which a petition for enforcement is filed under subsection

(l) or (m) shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary, the respondent named in the petition, and to any other parties to the proceeding before the administrative law judge.

(o) Civil action for enforcement when election is made for such civil action.

(1) If an election is made under subsection (a), the Secretary shall authorize, and not later than 30 days after the election is made the Attorney General shall commence and maintain, a civil action on behalf of the aggrieved person in a United States district court seeking relief under this subsection. Venue for such civil action shall be determined under chapter 87 of *title 28, United States Code [42* USCS §§ 1391 et seq.].

(2) Any aggrieved person with respect to the issues to be determined in a civil action under this subsection may intervene as of right in that civil action.

(3) In a civil action under this subsection, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may grant as relief any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section 813 [*42 USCS § 3613*]. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under section 813 [*42 USCS § 3613*] shall also accrue to that aggrieved person in a civil action under this subsection. If monetary relief is sought for the benefit of an aggrieved person who does not intervene in the civil action, the court shall not award such relief if that aggrieved person has not complied with discovery orders entered by the court.

(p) Attorney's fees. In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under section 812 [*42 USCS § 3612*], the administrative law judge or the

court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by *section 504 of title 5, United States Code*, or by *section 2412 of title 28, United States Code*.

42 USCS § 3613

§ 3613. Enforcement by private persons

(a) Civil action.

(1) (A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this title was pending with respect to a complaint or charge under this title based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 810(a) [*42 USCS § 3610(a)*] and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this title with respect to such charge.

(b) Appointment of attorney by court. Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may--

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted.

(1) In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals. Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide

purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this title.

(e) Intervention by Attorney General. Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 814(e) [*42 USCS § 3614(e)*] in a civil action to which such section applies.

24 CFR 103.400

§ 103.400 Reasonable cause determination.

(a) If a conciliation agreement under § 103.310 has not been executed by the complainant and the respondent and approved by the Assistant Secretary, the Assistant Secretary shall conduct a review of the factual circumstances revealed as part of HUD's investigation.

(1) If the Assistant Secretary for Fair Housing and Equal Opportunity determines that, based on the totality of factual circumstances known at the time of the Assistant Secretary's review, no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Assistant Secretary shall: Issue a short and plain written statement of the facts upon which the Assistant Secretary has based the no reasonable cause determination; dismiss the complaint; notify the aggrieved person and the respondent of the dismissal (including the written statement of facts) by mail; and make public disclosure of the dismissal. The respondent may request that no public disclosure be made. Notwithstanding such a request, the fact of

dismissal, including the names of the parties, shall be public information available on request. The Assistant Secretary's determination shall be based solely upon the facts concerning the alleged discriminatory housing practice provided by complainant and respondent and otherwise disclosed during the investigation. In making this determination, the Assistant Secretary shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in federal court.

(2) If, based on the totality of the factual circumstances known at the time of the decision, the Assistant Secretary believes that reasonable cause may exist to believe that a discriminatory housing practice has occurred or is about to occur, the Assistant Secretary shall determine that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, in all cases not involving the legality of local land use laws or ordinances (except as provided in paragraph (b) of this section). The Assistant Secretary's determination shall be based solely on the facts concerning the alleged discriminatory housing practices provided by complainants and respondents and otherwise identified during the investigation in making this determination. In making this determination, the Assistant Secretary shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in federal court.

(i) If the Assistant Secretary determines that reasonable cause exists, the Assistant Secretary, upon receipt of concurrence of the General Counsel, will issue such determination and direct the issuance of a charge under § 103.405 on behalf of the aggrieved person, and shall notify the complainant and the respondent

of this determination by certified mail or personal service.

(ii) If the Assistant Secretary determines that no reasonable cause exists, the Assistant Secretary shall: Issue a short and plain written statement of the facts upon which the Assistant Secretary has based the no reasonable cause determination; dismiss the complaint; notify the complainant and the respondent of the dismissal (including the written statement of facts) by mail; and make public disclosure of the dismissal. The complainant or respondent may request that no public disclosure be made. Notwithstanding such a request, the fact of dismissal, including the names of the parties, shall be public information available on request.

(3) If the Assistant Secretary determines that the matter involves the legality of local zoning or land use laws or ordinances, the Assistant Secretary, in lieu of making a determination regarding reasonable cause, shall refer the investigative material to the Attorney General for appropriate action under section 814(b)(1) of the Fair Housing Act, and shall notify the complainant and the respondent of this action by mail or personal service.

(b) The Assistant Secretary may not issue a charge under paragraph (a) of this section regarding an alleged discriminatory housing practice, if an aggrieved person has commenced a civil action under an Act of Congress or a state law seeking relief with respect to the alleged housing practice and the trial in the action has commenced. If a charge may not be issued because of the commencement of such a trial, the Assistant Secretary shall so notify the complainant and the respondent by certified mail or personal service.

(c)(1) A determination of reasonable cause or no reasonable cause by the Assistant Secretary shall be made within 100 days after filing of the complaint (or where the Assistant Secretary has reactivated a complaint, within 100 days after service of the notice of reactivation under § 103.115), unless it is impracticable to do so.

(2) If the Assistant Secretary is unable to make the determination within the 100-day period specified in paragraph (c)(1) of this section, the Assistant Secretary will notify the complainant and the respondent by mail of the reasons for the delay.